

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 92-5

May 11, 1992

TO : All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM : Jerry M. Hunter, General Counsel

SUBJECT: Guidelines for Response to Beck-Related Public Inquiries .

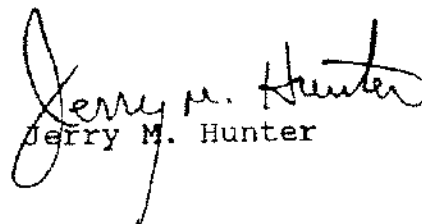
We anticipate, based on President Bush's April 13, 1992 Executive Order, that there may be an increased number of public inquiries concerning Beck and related union-security issues. To assist in your ongoing training of Board agents concerning these matters, we have prepared the attached reference guide consisting of proposed responses to typical inquiries. This material is designed as an internal guide for information officers in responding to such inquiries and will help ensure that the Agency is providing accurate and complete information to the public concerning this critical topic.

Copies of this guide are being sent under separate cover. Please make sure that these copies are provided promptly to all professional staff members, and that each person who serves as information officer is fully familiar with the contents. Also, please use this guide as the focal point of a staff meeting on Beck and related matters as soon as possible.

During your staff meeting, please reiterate that my policy is to provide accurate responses to all public inquiries. If the information officer does not know the answer to a question, or has any uncertainty about the answer, he or she should obtain the name and phone number of the person inquiring and provide an appropriate response later, rather than attempting to answer the question at the time.

Since this reference guide does not purport to identify and address all possible questions which may arise in this area, Regions may wish to expand upon it as deemed appropriate. However, the Regions should coordinate any such expansion or addition with the Divisions of Advice and Operations-Management to ensure that the Regions' views are consistent with positions taken by the Office of the General Counsel.

Any questions concerning this should be directed to your Assistant General Counsel.


Jerry M. Hunter

Attachment

Distribution:
Regional - All Professional Employees
NLRBU

MEMORANDUM GC 92-5

Office of the General Counsel
Division of Operations-Management

QUESTIONS AND ANSWERS ON TYPICAL
UNION-SECURITY AND BECK ISSUES

Following is a series of typical questions and answers which may be posed to Board agents concerning the Supreme Court's decision in Communications Workers of America v. Beck, 487 U.S. 735 (1988), or other issues relating to union-security obligations.

This material is designed to supplement the training which Board agents have received in the past with respect to Beck and other union-security issues,¹ and will serve as a desk reference in responding to public inquiries. As always, if there is any uncertainty about how to respond to a public inquiry, the Board agent should secure a phone number from the caller and call back after consulting with a supervisor to obtain the necessary information.

1. WHAT DID THE SUPREME COURT HOLD IN BECK?

The Supreme Court held that the proviso to Section 8(a)(3) of the Act (which allows employers and unions to enter into union-security agreements) does not "permit a union, over the objections of dues-paying nonmember employees, to expend funds so collected [pursuant to a union-security clause] on activities unrelated to collective bargaining, contract administration or grievance adjustment." The Court also concluded that "such expenditures violate the union's duty of fair representation."

2. WHO IS ELIGIBLE FOR BECK RIGHTS?

In Beck, the Supreme Court held that a union was not permitted, "over the objections of dues-paying nonmember employees," (emphasis supplied) to expend funds for nonrepresentational purposes. To fall within this definition, an employee (1) must be a nonmember and (2) must be covered by a union-security clause in a collective-bargaining agreement [i.e., a clause which is permitted by the proviso to Section 8(a)(3)]. Such employees are often referred to as "financial core members."

1 In this regard, see Memorandum OM 89-91 dated August 10, 1989 and Memorandum OM 90-31 dated May 2, 1990.

3. HOW DOES BECK AFFECT EMPLOYEES IN "RIGHT-TO-WORK" STATES?

A number of states have exercised their option under Section 14(b) of the Act to pass legislation outlawing union-security agreements. Such legislation is commonly referred to as a "right-to-work" law. States currently having such laws include: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana (agricultural workers only), Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming.

Employees working in states with "right-to-work" laws cannot be compelled to pay union dues.

4. WHAT ARE A UNION'S OBLIGATIONS UNDER BECK?

In general terms, these obligations are to provide notice, at least once a year, to nonmember employees of their Beck rights; to refrain from charging objectors for nonrepresentational expenses and to provide objectors with a detailed financial disclosure.

Notice

The Office of the General Counsel takes the position that a union must provide an annual notice to all nonmember employees containing the following information:²

- (a) the percentage of funds spent in the last accounting year for nonrepresentational expenses.
- (b) a statement that nonmember employees may object to having union-security monies spent for that purpose.
- (c) a statement that an objecting nonmember will be charged only for representational activities.
- (d) a statement that an objecting nonmember would be provided with a detailed information concerning the breakdown between representational and nonrepresentational activities.
- (e) specification of any "window period" for filing objections.

2 It should be emphasized that the Board and courts have the ultimate determination in this and other Beck matters. The positions reflected herein are only those taken by the Office of the General Counsel and in no way reflect the view of the Board.

Objection/Disclosure/Challenge

If a nonmember objects to paying that portion of dues which covers nonrepresentational activities, the union has an obligation to:

- (a) refrain from charging the employee for nonrepresentational functions.
- (b) provide the objector with information (i.e., disclosure) setting forth the union's major expenditures during the previous accounting year, distinguishing between representational and nonrepresentational functions. This information must be verified by an independent auditor using generally accepted accounting principles and be sufficiently detailed to allow the objector to make an informed decision whether to challenge the allocation.

If the employee challenges the union's allocation of representation and nonrepresentational expenses, the union must place the disputed amount into escrow while the matter is being resolved. An employee may file an unfair labor practice charge concerning the issue. The union may also establish a system for resolution of such challenges, provided that the system is "expeditious and impartial."

The above is, of necessity, a general description of a union's obligations. It is beyond the scope of this reference guide to cover the many issues which may arise with respect to these obligations. Issues concerning any of the above procedures may be raised in the form of appropriate unfair labor practice charges.

5. WHAT EXPENSES ARE "NONREPRESENTATIONAL?"

The Court held that Section 8(a)(3) does not permit unions to expend funds, over the objection of the nonmember employees, on activities "unrelated to collective bargaining, contract administration and grievance adjustment." The Board and courts must determine, in contested cases, which specific functions fall within these categories.

The Office of the General Counsel has taken the position that certain expenses, including lobbying and organizing, are nonrepresentational. However, employees have the option to challenge, through the filing of an unfair labor practice charge, a union's determination that any particular function or functions should be classified as representational.

6. HOW DOES AN EMPLOYEE INVOKE HIS/HER BECK RIGHTS?

In order to invoke Beck rights, an employee must object to the use of his/her union-security dues for nonrepresentational purposes. The Office of the General Counsel has taken the position that objections will not be assumed. Similarly, unions may require employees to renew their objection annually, and may establish "window periods" for filing such objections. However, new unit employees and union members who resign their membership must be given the opportunity to file such objections without regard to a union's established "window period."

Employees believing that any aspect of a union's Beck policies are unlawful may, as always, raise this issue by filing an unfair labor practice.

7. WHAT IF A UNION SEEKS THE DISCHARGE OF AN EMPLOYEE FOR NONPAYMENT OF DUES, WHERE THE UNION HAS NOT COMPLIED WITH ITS BECK OBLIGATIONS?

If a union requests that an employer discharge an employee for alleged nonpayment of dues without the union having afforded Beck rights, the union's action may violate Section 8(b)(1)(A) and 8(b)(2) of the Act. The employee should be advised of the option to file an appropriate unfair labor practice charge, assuming that it may still be timely done pursuant to Section 10(b).

8. WHAT DID PRESIDENT BUSH'S APRIL 13, 1992 EXECUTIVE ORDER PROVIDE?

The Executive Order, a copy of which is attached, was to become effective by May 13, 1992 and requires all Federal agencies to begin including in their contracts a provision obligating the contracting employer to post workplace notices informing employees of Beck rights. The Order will be administered by the Department of Labor.

In addition, the White House press release accompanying the Executive Order announced that the Department of Labor would be issuing proposed rules amending the financial reporting requirements for unions to require that they report their expenditures by functional categories, such as contract negotiation and administration, safety and health, political activities and other functions.

Inquiries concerning the workplace notices or reporting requirements should be referred to the nearest office of the Department of Labor.

9. WHAT IF THE EMPLOYER OR THE EMPLOYEE IS NOT COVERED BY THE NLRA?

The Executive Order covers not only employees who are covered by the NLRA but also those who may be covered under the Railway Labor Act (RLA). As usual, inquiries by employees covered under the RLA should be referred to the nearest office of the National Mediation Board. Similarly, inquiries by state or local government employees, or agricultural employees, or others not covered by either the NLRA or the RLA should be referred to the appropriate state labor relations agency, if there is one.

10. WHAT DO YOU TELL AN EMPLOYEE WHO INQUIRES WHETHER HE/SHE IS REQUIRED TO BE A UNION MEMBER IN ORDER TO MAINTAIN EMPLOYMENT?

Under current law, no one has to be a member of a union in order to maintain a job. Under the proviso to Section 8(a)(3), employers and unions may enter into union-security agreements requiring (except in "right to work" states; see discussion above) all employees in a particular bargaining unit to become "members" on or after the 30th day following being hired.³ However, in a 1963 decision, NLRB v. General Motors Corporation, 373 U.S. 734, 53 LRRM 2313, the Supreme Court held that the term "member" requires only the payment of periodic dues and fees as opposed to full membership. Since the Court noted that "the membership that is required has been whittled down to its financial core"⁴, individuals choosing that approach are often referred to as "financial core members."

In light of Beck, the "financial core" dues and fees obligation of nonmembers now extends only to "representational" expenses, assuming that the nonmember exercises his/her Beck right to affirmatively object to paying for nonrepresentational expenses.

11. WHAT IF AN EMPLOYEE INQUIRES IF HE OR SHE MAY RESIGN FROM A UNION, DESPITE RESTRICTIONS ON SUCH RESIGNATIONS IN THE UNION'S CONSTITUTION OR BY-LAWS?

The Supreme Court held, in a 1985 case, Pattern Makers League v. NLRB (Rockford-Beloit Pattern Jobbers), 473 U.S. 95, that an employee is free to resign from "full" union membership at any

3 Pursuant to Section 8(f) of the NLRA, this time period is 7 days or after for employees of employers "engaged primarily in the building and construction industry."

4 General Motors, supra, 373 U.S. 734, at 742.

time. You should inform the employee that any resignation should be made in such a way so as to leave no doubt of intent. The employee should also be advised of their right to file a charge with respect to any action by the union to prevent the resignation. Similarly, the employee has the option of challenging, through an unfair labor practice charge, the legality of any restriction in the union constitution or by-laws concerning resignation.

12. WHAT IF AN EMPLOYEE ADVISES YOU THAT HIS/HER RELIGION PREVENTS HIM/HER FROM JOINING A LABOR ORGANIZATION AND INQUIRES WHETHER HE/SHE IS STILL REQUIRED TO PAY UNION-SECURITY DUES?

Section 19 of the Act⁵ provides that "any employee who is a member of and adheres to established and traditional tenets or . . . teachings of a bona fide religion, body or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment. . . ." However, Section 19 also provides that such employees may be required, in lieu of periodic dues, to pay sums equal to such dues to a "nonreligious, nonlabor organization charitable fund exempt from taxation under . . . the Internal Revenue Code chosen by the employee from a list of at least three such funds designated in the contract or if the contract fails to designate such funds then to any such fund chosen by the employee."

The Office of the General Counsel has not yet considered whether Beck has any impact on Section 19. Those wishing to raise that or any other issue concerning Section 19 may, as always, do so by filing an unfair labor practice charge.

Attachment

5 Board agents should be aware that in Hugh Wilson v. NLRB, 920 F.2d 1280, 135 LRRM 3177 (1990), the Sixth Circuit held that Section 19 was unconstitutional. A petition for certiorari has been pending before the Supreme Court since February 28, 1991.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

April 13, 1992

EXECUTIVE ORDER

NOTIFICATION OF EMPLOYEE RIGHTS CONCERNING
PAYMENT OF UNION DUES OR FEES

By the authority vested in me as President by the Constitution and the laws of the United States, in order to provide employees, labor organizations, and contracting employers with information concerning the rights of employees, and thereby to promote harmonious relations in the workplace for purposes of ensuring the economical and efficient administration and completion of Government contracts, it is hereby ordered as follows:

Section 1. The Secretary of Labor ("Secretary") shall be responsible for the administration and enforcement of this order. The Secretary shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of this order.

Sec. 2. (a) Except in contracts exempted in accordance with section 3 of this order, all Government contracting departments and agencies shall, to the extent consistent with law, include the following provisions in every Government contract, other than collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and small purchase contracts governed by Part 13 of the Federal Acquisition Regulation (48 C.F.R. 13.000-13.507), entered into, amended, renegotiated, or renewed, after the effective date of this order:

"1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form as the Secretary of Labor may prescribe, in conspicuous places in and about its plants and offices, including all places where notices to employees are customarily posted. The notice shall include the following information (except that the last sentence shall not be included in notices posted in the plants or offices of carriers subject to the Railway Labor Act, as amended (45 U.S.C. 151-188)):

Notice to Employees

Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, and grievance adjustment.

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(OVER)

If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments.

For further information concerning your rights, you may wish to contact either a Regional Office of the National Labor Relations Board or:

National Labor Relations Board
Division of Information
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570.

"2. The contractor will comply with all provisions of Executive Order No. 12800 of April 13, 1992, and related rules, regulations, and orders of the Secretary of Labor.

"3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order No. 12800 of April 13, 1992. Such other sanctions or remedies may be imposed as are provided in Executive Order No. 12800 of April 13, 1992, or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

"4. The contractor will include the provisions of paragraphs (1) through (3) in every subcontract or purchase order entered into in connection with this contract unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order No. 12800 of April 13, 1992, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any such subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for noncompliance: Provided, however, that if the contractor becomes involved in litigation with a subcontractor or vendor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

(b) Whenever, through Acts of Congress or through clarification of existing law by the courts or otherwise, it appears that contractual provisions other than, or in addition to, those set out in subsection (a) of this section are needed to inform employees fully and accurately of their rights with respect to union dues, union-security agreements, or the like, the Secretary shall promptly issue such rules, regulations, or orders as are needed to cause the substitution or addition of appropriate contractual provisions in Government contracts thereafter entered into.

Sec. 3. (a) The Secretary may, if the Secretary finds that special circumstances require such an exemption in order to serve the national interest, exempt a contracting department or agency from the requirements of any or all of the provisions of section 2 of this order with respect to a particular contract, subcontract, or purchase order.

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(b) The Secretary may, by rule, regulation, or order, exempt from the provisions of section 2 of this order certain classes of contracts (i) to the extent that they involve work outside the United States and do not involve the recruitment or employment of workers within the United States; (ii) to the extent that they involve work in jurisdictions where State law forbids enforcement of union-security agreements; (iii) to the extent that they involve work at sites where the notice to employees described in section 2(a) of this order would be unnecessary because the employees are not represented by a union; (iv) to the extent that they involve numbers of workers below appropriate thresholds set by the Secretary; or (v) to the extent that they involve subcontracts below an appropriate tier set by the Secretary.

(c) The Secretary may provide, by rule, regulation, or order, for the exemption of facilities of a contractor, subcontractor, or vendor that are in all respects separate and distinct from activities related to the performance of the contract: Provided, that such exemption will not interfere with or impede the effectuation of the purposes of this order: And provided further, that in the absence of such an exemption all facilities shall be covered by the provisions of this order.

Sec. 4. (a) The Secretary may investigate any Government contractor, subcontractor, or vendor to determine whether the contractual provisions required by section 2 of this order have been violated. Such investigation shall be conducted in accordance with procedures established by the Secretary.

(b) The Secretary shall receive and investigate complaints by employees of a Government contractor, subcontractor, or vendor where such complaints allege a failure to perform or a violation of the contractual provisions required by section 2 of this order.

Sec. 5. (a) The Secretary, or any agency or officer in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, regarding compliance with this order as the Secretary may deem advisable.

(b) The Secretary may hold hearings, or cause hearings to be held, in accordance with subsection (a) of this section prior to imposing, ordering, or recommending the imposition of sanctions under this order. Neither an order for debarment of any contractor from further Government contracts under section 6(b) of this order nor the inclusion of a contractor on a published list of noncomplying contractors under section 6(c) of this order shall be carried out without affording the contractor an opportunity for a hearing.

Sec. 6. In accordance with such rules, regulations, or orders as the Secretary may issue or adopt, the Secretary may:

(a) after consulting with the contracting department or agency, direct that department or agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor to comply with the contractual provisions required by section 2 of this order; contracts may be cancelled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon future compliance: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of the contracting department or agency an opportunity to offer written objections, which shall include a complete statement of reasons for the objections, among which

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reasons shall be a finding that completion of the contract is essential to the agency's mission, to the issuance of such a directive: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of the contracting department or agency continues personally to object to the issuance of such directive;

(b) after consulting with each affected contracting department or agency, provide that one or more contracting departments or agencies shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary that such contractor has complied with and will carry out the provisions of this order: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of each contracting department or agency an opportunity to offer written objections, which shall include a complete statement of reasons for the objections, among which reasons shall be a finding that further contracts or extensions or other modifications of existing contracts with the noncomplying contractor are essential to the agency's mission, to the issuance of such a directive: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of a contracting department or agency continues personally to object to the issuance of such directive; and

(c) publish, or cause to be published, the names of contractors that have, in the judgment of the Secretary, failed to comply with the provisions of this order or of related rules, regulations, and orders of the Secretary.

Sec. 7. Whenever the Secretary invokes section 6(a) or 6(b) of this order, the contracting department or agency shall report the results of the action it has taken to the Secretary within such time as the Secretary shall specify.

Sec. 8. Each contracting department and agency shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions under this order.

Sec. 9. The Secretary may delegate any function or duty of the Secretary under this order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

Sec. 10. The Federal Acquisition Regulatory Council shall take whatever action is required to implement in the Federal Acquisition Regulation the provisions of this order and of any related rules, regulations, or orders of the Secretary.

Sec. 11. Nothing contained in this order or promulgated pursuant to this order is intended to confer any substantive or procedural right, benefit, or privilege enforceable at law by a party against the United States, its agencies or instrumentalities, its officers, or its employees, nor to authorize the assessment of any dues or fees by any labor organization.

Sec. 12. This order shall become effective 30 days after the date of this order.

GEORGE BUSH

THE WHITE HOUSE,
JAN 11 1991